time work was done. The case of *Bonham-Carter* v. *Hyde Park Hotel*[1] was cited for the proposition that the respondents had to prove their claims strictly if they wished the court to award them damages. It was further argued that the respondents had to prove that overtime work was done at the request of the appellants and not under a contract of service.

A short answer to this ground of appeal is that there was no dispute as to the number of hours for which the respondents worked. It was common ground between the parties that there was no written contract of service as such. Whatever overtime work the respondents did was clearly done at the request of the appellants. Assuming that they did work under a contract of service, section 7 of the Ordinance provides that no condition of any contract of service shall be contrary to the provisions of the Ordinance and that any such condition which is contrary to such provisions shall be void and of no effect. That nullifies the argument that overtime work was done under and by virtue of the contract of service and not at the request of the employers. As regards their claims, they were not for damages but for wages for overtime work as are permitted under the Ordinance.

The other grounds of appeal boil down to the proposition that the learned judge was wrong in holding that the fact that the 12 hours included meal breaks and rest periods should not make any difference in the computation of hours of overtime work because of section 59(5) of the Ordinance and that even on the facts found by him the amount of overtime wages awarded was excessive. It is to be observed that the respondents themselves claimed overtime wages for a maximum of 2 hours 15 minutes a day after making an allowance for their rest and meal periods. The appellants, on the other hand, claimed that the respondents had more than 3 hours for their rest and meal periods. It is further to be observed that section 59(5) of the Employment Ordinance had been repealed, a fact which was overlooked by the learned judge when he decided the appeal on the basis of that section.

What the learned judge had to consider was the provision contained in section 60A(8) of the Ordinance which reads:

"The provisions of this section shall not apply to labourers engaged in work which by its nature involves long hours of inactive or stand-by employment."

The only point to be decided in this appeal therefore is whether the rest and meal periods of the respondents were "long hours of inactive or stand-by employment." Taken by themselves and in isolation, these rest periods may not be considered long hours of inactive or standby employment, but their sum total must be considered in relation to the period of 4 hours for which the respondents remained at work in excess of 8 hours. If it is agreed that each of them had at least 2 hours of inactive or standby employment in relation to the 4 hours of overtime work, then such rest periods must be treated as long hours of inactive employment. It was pointed out by counsel for the respondents that the appellants had in fact admitted the claim for 4 hours, but that admission was clearly made under a misapprehension of law, so that they should not be held to be bound by it.

In the result I would hold that the respondents were entitled to wages for 2 hours of overtime work per day. I would therefore allow the appeal to the extent that their claims be reduced to half the amounts as held to be due to them by the learned appellate judge. In all the circumstances of the case I will make no order as to costs.

Ong Hock Sim and **Raja Azlan Shah F.JJ.** concurred.

Order accordingly.

Solicitors: *Joseph & Son; Skrine & Co.*

U.N. FINANCE BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Abdul Hamid J.) November 11, 1974]
[Kuala Lumpur — Originating Motion No. 3 of 1974]

Income Tax — Company buying and selling shares — Whether company carrying on business of dealing in shares or making investments in shares — Question of fact determined by Special Commissioners — Whether court can interfere — Losses incurred by the company through their branch in Singapore — Whether deductible — Double Taxation Relief (Republic of Singapore) Order 1966, art. IV(1)(a) — Income Tax Act, 1967, ss. 4(a) and 40.

In this case the appellants were a company whose objects *inter alia* were the accumulation of capital by means of monthly subscriptions or otherwise and also by borrowing money from members, depositors and others. They also had powers to acquire movable and immovable property by way of investment with a view to resale. The appellants bought and sold shares in a number of companies and in respect of the sale of some shares made a profit on which they were assessed to tax. They contended that the purchasing of shares was made as a long term investment and the profits made were capital in nature being realization of capital investments. The appellants incurred losses through their branch in Singapore and sought to have these losses taken into account in arriving at their chargeable income. The Special Commissioners held that the profits realized by the appellants for the sale of their shares was assessable to tax and they also held that the appellants were entitled to deduct their trading losses in Singapore from their income derived in Malaysia. The appellants appealed and the Director-General of Inland Revenue counter-appealed.

Held: (1) the Special Commissioners in this case were justified on the facts in arriving at a decision that the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade and therefore the profits from the sale of the shares in question were assessable to tax;

(2) the Special Commissioners had erred in law in arriving at the decision that the losses of the Singapore branch attributable to business carried out in Singapore should be deducted from their income derived in Malaysia in the ascertainment of the appellant's total income for the year of assessment 1968.

Cases referred to:-

(1) *J.P. Harrison (Watford) Ltd.* v. *Griffiths (H.M. Inspector of Taxes)* 40 T.C. 281 at p. 296 and 303.

(2) *Edwards* v. *Bairstow* [1966] A.C. 14, 36 T.C. 202 at p. 224 and 225.

(3) *Punjab Co-op Bank Ltd.* v. *C.I.T.* [1940] A.C. 1055 at p. 1072.

(4) *General Reinsurance Co. Ltd.* v. *Tomlinson (Inspector of Taxes)* [1970] 1 W.L.R. 566 at p. 569.

(5) *Case A 35* (1969) 69 ATC 201.

(6) *National Bank of Australasia Ltd.* v. *Federal Commissioners of Taxation* (1969) 69 ATC 4042.

(7) *Commissioners of Inland Revenue* v. *British Salemson Aero Engines Ltd.* 22 T.C. 29 at p. 43.

(8) *Harvey* v. *Caulcott* 33 T.C. 159.

(9) *Mitchell Bros.* v. *Tomlinson (H.M. Inspector of Taxes)* (1957) 37 T.C. 224.

(10) *Cooksey and Bibbey* v. *Reduall (H.M. Inspector of Taxes)* 30 T.C. 514.

(11) *Lucy and Sunderland* v. *Hunt (H.M. Inspector of Taxes)* 40 T.C. 132 at p. 138.

(12) *The Dunn Trust Ltd.* v. *Williams (H.M. Inspector of Taxes)* 31 T.C. 477.

(13) *California Copper Syndicate* v. *Harris* 5 T.C. 159, 165, 166.

(14) *Taylor* v. *Good* [1973] 1 W.L.R. 1249 at p. 1254; [1973] 2 All E.R. 785.

(15) *Taylor* v. *Good* (C.A.) [1974] 1 W.L.R. 556 at p. 559; [1974] 1 All E.R. 1137.

(16) *Rutledge* v. *Commissioners of Inland Revenue* 14 T.C. 490 at p. 496.

(17) *E. Finance Co.* v. *Comptroller of Income Tax* [1970] 2 M.L.J. xxviii.

(18) *Frasers (Glasgow) Bank Ltd.* v. *Commissioners of Inland Revenue* 40 T.C. 698 at p. 712.

(19) *Jones* v. *Leeming* [1930] A.C. 432 at p. 457.

(20) *Scottish Investment Trust Ltd.* v. *Forbes* 3 T.C. 231 at p. 234.

(21) *Westminster Bank* v. *Osler* 17 T.C. 381.

CASE STATED.

S. D. K. Peddie for the appellants.

Mohammad Nizar bin Idris (Federal Counsel) for the respondent.

Abdul Hamid J.: This is an appeal by the U.N. Finance Berhad (I shall call "the appellants") against the decision of the Special Commissioners of Income Tax that the profits realised by the appellants for the sale of their shares in the United Estate Projects Sendirian Berhad (I shall call "U.E.P. Shares") in 1967 and 1968 were assessable to tax. There is also an appeal by the Director General of Inland Revenue (I shall call "the Revenue") against that part of the Special Commissioners' decision allowing the appellants to deduct their trading losses in Singapore from their income derived in Malaysia.

Stating the case for the opinion of this court pursuant to paragraph 34 of Schedule 5 of the Income Tax Act, 1967 the Special Commissioners have set out the following facts found by them.

The appellants, a wholly owned subsidiary of the United Malayan Banking Corporation Berhad, were incorporated on July 6, 1962 with an authorised capital of $10,000,000 (100,000 shares of $100 each). The issued and paid-up capital was $200 (2 subscribers' shares). The objects of the appellants are set out in their Memorandum and Articles of Association and included, *inter alia*, the accumulation of capital by means of monthly subscriptions or otherwise and also by borrowing money from members, depositors and so forth. They also had powers to acquire movable and immovable property by way of investment with a view to resale.

On October 20, 1964 the appellants increased their paid-up capital from $200 to $1,000,000 by the issue of 9,998 shares ($100 each). The paid-up capital was further increased from $1,000,000 to $4,000,000 on May 14, 1971.

The appellants did not commence business until November 16, 1964 on which date they started to receive deposits. The appellants commenced their business in Singapore on February 1, 1965.

From October 1964 onwards, however, for period ending 1969 mainly, the appellants bought and sold shares in the following companies —

(1) Metropole Realty Sdn. Bhd. Purchased on November 13 and November 27, 1964 and in 1966 and 1969 500,000 shares;

(2) U.E.P. Purchased in October 1964 3,000,000 shares. Payments were made on October 20, 1964, December 15, 1964, March 30, 1965 and May 6, 1965.

(3) Sold on December 6, 1967 750,000 shares with $450,000 profit; sold on May 24, 1968 1,000,000 with $750,000 profit.

(4) Transferred to Metropole on June 25, 1969 1,250,000 shares at no profit.

(5) National Construction Co. Pte. Ltd. Purchased on June 30, 1965 and October 31, 1967 430,000 shares. Transferred to Metropole Realty Sdn. Bhd. on May 14, 1971.

(6) Overseas Union Enterprise Ltd. Purchased on December 30, 1964 and October 10, 1968 350,000 shares. Transferred to Metropole Realty Sdn. Bhd. on June 30, 1969.

(7) Century Gardens Sdn. Bhd. Purchased on December 28, 1966 250,000 shares. Sold on May 31, 1969 250,000 at $125,000 profit.

(8) United Overseas Finance Ltd., Hong Kong. Purchased on September 19, 1967 1,200,000 shares. Sold on December 31, 1970 at $88,419 profit.

(9) Malaysia Hong Kong Land Development Co. Sdn. Bhd. Purchased on October 25, 1967, June 19, 1968 and August 28, 1968 400,000 shares. Transferred to Metropole on June 30, 1969.

(10) Selangor Dredging Bhd. Purchased on October 3, 1967 and September 29, 1969 15,261 shares. Sold on July 30, 1970 and September 18, 1970 at $2,813,000 profit.

(11) United National Finance (Singapore) Ltd. Purchased on January 31, 1969 3,000,000 shares. Transferred to U.M.B.C. on May 14, 1971.

(12) The Development Bank of Singapore. Purchased on November 1, 1968 and November 22, 1968 736,000 shares. Sold on June 30, 1969 436,000 shares for $388,131 profit. Transferred 300,000 shares to United National Finance (Singapore) Ltd. on June 30, 1969.

(13) United Malayan Warehouse (Private) Ltd. Purchased on June 5, 1969 and June 18, 1969 100,000 shares. Transferred to United National Finance (Singapore) Ltd. on June 19, 1969 100,000 shares.

On October 16, 1964 a trust deed was executed between 7 parties, namely, Chang Ming Thien, Tee Teh, Lim Jo Yan, United General Insurance Co. Ltd.,

the appellants, United Malayan Bank Nominees Ltd. and Singapore Nominees Ltd. providing, *inter alia*, as follows —

"Whereas by an agreement dated the 9th day of October 1964 (hereinafter referred to as 'the Purchase Agreement') and entered into between MALAYSIA PROJECTS DEVELOPMENT CORPORATION LIMITED (hereinafter referred to as 'the Company') of the one part and the first party of the other part, the company has *inter alia* agreed to sell and the first party to purchase all that portion of the land held under Selangor Certificate of Title No. 15114 for Lot 1131 comprising an area of approximately 1,240 acres which said portion is more particularly described in the sale agreement (hereinafter referred to as 'the Sale Portion') subject to the terms and conditions of the purchase agreement.

AND WHEREAS the parties hereto have prior to the execution of the purchase agreement mutually agreed amongst themselves to purchase and take up their respective shares as hereinafter set out in the sale portion and to contribute and pay towards the purchase price of the sale portion to the extent of their said respective shares.

AND WHEREAS the parties hereto have mutually agreed that they will incorporate and subscribe a private or public limited company in the States of Malaya with the primary object of developing the sale portion into a housing estate but during the time available such incorporation could not materialise and have requested the first party to execute the purchase agreement with the company as trustee for and on behalf of the said private or public limited company.

NOW THIS DEED WITNESSETH as follows:—

1. In consideration of the premises and the due performance by the parties hereto of the terms and conditions herein contained the parties have at the date hereof deposited in a special account for the implementation of this agreement known as CHANG MING THIEN TRUST ACCOUNT with the United Malayan Banking Corporation Limited, 42, Jalan Mountbatten, Kuala Lumpur, the sums of money set opposite their respective names as follows:—

(a) The first party	$2,850,000
(b) The second party	600,000
(c) The third party	300,000
(d) The fourth party	300,000
(e) The fifth party	300,000
(f) The sixth party	150,000
(g) The seventh party	1,500,000
	$6,000,000

2. ....

3. In consideration of the premises the parties hereto mutually agree to contribute and pay on the 15th day of December 1964 the sums set opposite their respective names as follows:—

(a) The first party	$1,900,000
(b) The second party	400,000
(c) The third party	200,000
(d) The fourth party	200,000
(e) The fifth party	200,000
(f) The sixth party	100,000
(g) The seventh party	1,000,000
	$4,000,000

The parties hereto mutually agree with each other that they will on the 15th day of December 1964 deposit to the said Chang Ming Thien Trust Account the sums set opposite their respective names as aforesaid and in the event of any one party failing to comply with or commit a breach of this clause such party shall indemnify the other hereto in respect of such failure or breach."

On the same day (October 16, 1964) the directors of the appellants by a resolution approved the purchase of $500,000 worth of shares in a limited company to be incorporated in accordance with the trust deed.

On October 20, 1964 the appellants paid $300,000 as part payment for the $500,000 worth of shares and another $200,000 on December 15, 1964.

Pursuant to the terms of the trust deed, the U.E.P. was incorporated on December 31, 1964.

Before the execution of the trust deed the appellants agreed with Chang Ming Thien to take up $3,000,000 worth of shares in the U.E.P. unknown to the other parties and meanwhile Chang Ming Thien's interest in the U.E.P. would be stated as $2,500,000. The appellants had further agreed with Chang Ming Thien to pay $2,500,000 for the shares. When payment was not made on the date due Chang Ming Thien paid over personally. The appellants, however, reimbursed Chang Ming Tnien paying interest in the sum of $78,185 on May 6, 1965.

On October 24, 1964 the appellants wrote to the Governor of Bank Negara stating their decision to commence various classes of finance business and asked for confirmation that Bank Negara would not object to their commencement of business forthwith.

On November 5, 1964 the Governor of Bank Negara replied that it had no objection to the appellants operating a finance company.

At the hearing before the Special Commissioners, Richard Kong Sik Hung gave oral testimony for the appellants. I have briefly summarised as follows. The appellants bought shares in the U.E.P. because one of the lines of appellants' business would be the granting of housing loans and the appellants' participation in the projects would generally generate a loan business to them. The other reason was to hold the shares as investment. As for the sale of U.E.P. shares to Tropical Investment on June 12, 1967, Richard Kong said that it came to the appellants' knowledge that Singapore was to bring into force the Finance Companies Act restricting investments of finance companies to 25% of issued share capital plus reserves and this prompted them to take corrective action in case Malaysia should introduce similar legislation to control finance companies. Although the Finance Companies Act, Singapore was passed on December 27, 1967 the appellants heard rumours about this 6 to 12 months before the passing of the Act. This induced them to believe that Malaysia would follow suit.

On May 24, 1968 the appellants sold 1,000,000 U.E.P. shares to Tropical Investment for the same reasons as stated earlier. They advanced loans to the Tropical Investment equivalent to the purchase price of the shares to enable Tropical Investment to purchase the shares.

Richard Kong conceded that the sale of the U.E.P. shares was not made necessary by reason of withdrawals by depositors as there was no demand by depositors for withdrawals.

Richard Kong was cross-examined at length and he was also questioned by the Special Commissioners. He stated that on December 31, 1965 the appellants gave $1,500,000 loan to U.E.P. — an ordinary loan in the course of ordinary business.

On August 13, 1965 the appellants gave two loans of $550,000 and $115,000 to National Construction Co., Ltd.

He maintained that rumours of impending legislation might affect the appellants' ability to hold shares or buy new shares. Because of the Borrowing Companies Act, 1969, the appellants transferred all the 400,000 shares in the Malaysia Hong Kong Land Development Company to Metropole Realty Sdn. Bhd.

He further maintained that the appellants sold the shares because they were afraid it would be contrary to the Borrowing Companies Act and to infringe the Act might jeopardize their chances of obtaining licence to commence business of a Borrowing Company.

When asked why on the one hand the appellants sold the shares and on the other bought shares in Selangor Dredging, Richard Kong said that they thought it was a small amount and could therefore buy. The appellants also thought that as Selangor Dredging was a public company the Central Bank might not disallow them to hold the shares. He, however, agreed that it made no difference whether the companies were public or private.

Before the Special Commissioners the appellants contended that —

"(a) the purchasing of shares in the United Estate Projects Sdn. Bhd. was made as a long term investment with the object of obtaining a connection for the purpose of the finance business which the appellants intended to commence;

(b) the profits made on the sale of the shares in 1967 and 1968 were capital in nature being realisation of capital investments;

(c) the investments in the United Estate Projects did not form part of the business of the appellants; and

(d) the losses incurred by the appellants through their branch in Singapore should be taken into account in arriving at the chargeable income of the appellants for the year of assessment 1968."

The Revenue maintained that —

"(a) the appellants were trading in shares as could be seen by their conduct in the frequency of their buying and selling shares over short periods of time;

(b) no dividends were received from the U.E.P. The shares bought by the appellants in that company were not long term investments. They were part of the trade of the appellants as a finance company;

(c) the appellants' suggestion that the shares in the U.E.P. were bought also to generate their business as a finance company proves that the purchasing of shares was not an investment but was used for furtherance of their trade;

(d) the money from the realisation of shares in the U.E.P. and other companies was used in the ordinary business of the company and was thus part and parcel of the appellants' stock-in-trade; and

(e) the losses incurred by the appellants through their Singapore branch should be disallowed. Section 40 of the Income Tax Act, 1967, provides for adjusted losses. However, article IV(1)(b) of the Double Taxation Agreement 1966, entered into between Malaysia and Singapore, speaks of profits. Unless there are profits there can be no adjusted loss under section 40 of the Income Tax Act, 1967; therefore, the appellants cannot have their Singapore losses for the year of assessment 1968 taken into account."

The Special Commissioners stated that after having duly considered the evidence adduced before them and the submissions made by the parties, they were of the view that in buying and selling the U.E.P. shares, the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade and that the profits of $450,000 and $750,000 realised by the appellants on the resale of 750,000 and 1,000,000 U.E.P. shares on June 12, 1967 and May 24, 1968 respectively were assessable to tax under section 4(a) of the Income Tax Act, 1967.

They proceeded to give reasons for their finding. They are contained in paragraphs 16 to 20 of the record and are reproduced hereunder —

"16. Encik Richard Kong said that the appellants feared impending legislation in Malaysia which would restrict finance companies' investment holdings, yet the appellants continued to buy and sell shares. The Finance Companies Act, Singapore, was first published and passed as law on 27th December, 1967, while the appellants sold the first lot of 750,000 shares in the United Estate Projects Sdn. Bhd. on 12th June, 1967, because, according to Encik Richard Kong, the appellants 'heard rumours about this 6 to 12 months before the passing of the Act'."

"17. Our own Borrowing Companies Act, 1969, came into force on 1st June, 1969. Under section 10 of the Act, a licensed borrowing company is prohibited from establishing a subsidiary unless it is wholly-owned, incorporated in the Federation and has the prior written consent of the Central Bank. Under section 22 of the Act, no licensed borrowing company may acquire shares of any corporation without the consent in writing of the Central Bank. Encik Richard Kong said in his evidence that the appellants did not apply to the Central Bank to keep their shares in the Malaysia Hong Kong Land Development Co. Sdn. Bhd. In the case of United Overseas Ltd. Hong Kong, he said that the Hong Kong company being purely a finance business company the Central Bank might have allowed the appellants to keep the shares. However, the appellants made no application to the Central Bank to keep those shares which were eventually sold away on 31st December 1970, at a profit of $88,419.00. The appellants also made no application to the Central Bank in the case of Selangor Dredging Bhd. and the other companies, where the appellants could have applied to keep the shares if, indeed, the appellants had really intended to keep their shares as investments."

"18. The evidence of Encik Richard Kong regarding the rumours was not supported by any other evidence, oral or documentary. Moreover, the rumours concerned a foreign country. Even assuming that the appellants were apprehensive of impending restrictive legislation in Malaysia, their own conduct was wholly inconsistent. On the one hand they were selling away shares because of the fear of the legislation while on the other they were buying more shares despite that fear."

"19. We did not accept the reasons advanced by Encik Richard Kong as to why the appellants had bought and sold shares in various companies as listed in paragraph 9(e), above. The appellants had powers to deal in shares which they repeatedly bought and sold over a number of years. This, in our view, indicated that the appellants were embarking upon profit-making commercial transactions and were not buying the shares as investments. The fact that the appellants may have intended to form connections with the companies in which they bought the shares does not negative trading (see observations of Lord Guest in *J.P. Harrison (Watford) Ltd.* v. *Griffiths*, 40 T.C. 281 at 304)."

"20. We were also of the view that the buying and selling of shares by the appellants in various companies was connected with their principal business as a finance company. The profits realised on the sales of the shares were available and were made use of in their business. The summary of income and expenditure (Exhibit R12 Table III) clearly shows that the appellants' income from 1965 to 1969 (excluding profits from sales of shares) was insufficient to meet their outgoings for those years. The profits realised from the disposal of shares in 1967, 1968 and 1969 appear to have relieved the financial strain on the appellants."

Before I deal with the merits of this appeal, I must observe that although the facts seem to be quite straightforward, I find it rather hard to produce short answers to the questions raised without proceeding to examine as briefly as I possibly can, some of the cases that have been cited to me by Mr. Peddie for the appellants and Encik Mohamed Nizar representing the Revenue. Both counsel have been extremely helpful and have, without doubt, provided the court with considerable assistance without which my task would be more ardous.

May I first of all direct my mind to one or two authorities concerning the power of the court to review the decision of the Special Commissioners. It seems clear that the power of the court is severely limited and the court can only disturb the decision of the Commissioners if it is erroneous in point of law, and the court cannot interfere with a decision which is basically a conclusion of fact. Encik Nizar cited the case of *J. P. Harrison (Watford), Ltd.* v. *Griffiths (H. M. Inspector of Taxes*[1]) where Lord Reid said —

"Where, as in this case, the question is a question of fact, that means that the decision of the commissioners cannot be reviewed by the court. But if the decision of any tribunal on a question of fact is unreasonable, looking to the facts on which it is based, the court can and must intervene. The question in this case, is, therefore, not whether the commissioners were wrong but whether their decision was unreasonable."

In the same case Lord Guest had this to say —

"The finding of the commissioners cannot be disturbed unless it was arrived at upon a view of the facts which could not reasonably be entertained (*Edwards* v. *Bairstow*, [1966] A.C. 14, *per* Viscount Simonds at page 29 and Lord Radcliffe at pages 36 and 39)."

In *Edwards* v. *Bairstow*[2] Viscount Simonds had this to say —

"For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarised by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

At page 225 His Lordship proceeded to observe as follows —

"Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are...."

Bearing in mind the principles enunciated in *Edwards* v. *Bairstow* and *J. P. Harrison* v. *Griffiths*, *supra*, my task is to determine whether there was reasonable evidence to support the Commissioners' finding that in buying and selling U.E.P. shares the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade. The facts and the inferences which the Commissioners drew from these facts and upon which they based their finding, must be looked at to determine whether they were justified in arriving at such finding, in other words, whether on these facts the Special Commissioners were right in concluding that the transaction possessed the characteristics of an adventure or concern in the nature of trade

If after considering the question before them upon a view of the evidence which they could properly draw inferences of facts the Commissioners, rightly directed in law what the characteristics are, came to the conclusion that the transaction has those characteristics then in that event the question clearly is one of fact and the court is not entitled to intervene. On the other hand, the question is one of law if, in arriving at their finding, there was no evidence upon which the Commissioners could reasonably draw proper inferences of facts, in other words, if they acted upon a view of the facts which could not reasonably be entertained. In that event the court would be entitled to intervene.

Counsel for the appellants submitted that the Special Commissioners failed to have regard to the distinction for taxation purposes between assets acquired as investment and assets acquired as stock-in-trade and to consider the importance of the company's intention at the time of the acquisition of the investment or the profits made in the course of trade. He cited a number of cases in support of his submission.

Referring generally to securities purchased by finance companies, Mr. Peddie pointed out that dealings with assets are dealings in the course of trade. "The bank has always to keep sufficient cash or easily realizable securities to meet any probable demand by depositors." And "This is a normal step in carrying out banking business or, in other words, that is an act done in what is truly carrying on of the banking business." [See *Punjab Co-op. Bank Ltd.* v. *C.I.T.*[3]].

Basically the purchase and sales of shares and securities "are so much linked with the deposits and withdrawals that these purchases and sales are as much part of the assessee's business as receiving deposits from clients and paying them off, and that, therefore, the profits which arise from the former transactions are as much business profits as the profits arising from the later transactions." [See also *General Reinsurance Co. Ltd.* v. *Tomlinson (Inspector of Taxes)*[4]].

It was stressed that the practice of English insurance companies is to start from the very first accumulating large accessable funds for the purposes of meeting losses and "the funds received from the investment are just as much part of the mode of conducting business." It was argued that in *General Reinsurance Co. Ltd.* v. *Tomlinson (Inspector of Taxes)*, *supra*, the company was already in business, quite unlike the present case. It was further argued that each and particular transaction must be examined and for support he referred to a passage from *Kanga and Palkhivala* on Income Tax volume 1 6th ed. (1969) page 109 which reads —

"The profit is revenue where the realisation or conversion of shares or securities is in the course of the carrying on, or carrying out, of business. Viscount Maugham observed in *Punjab Co-op. Bank Ltd.* v. *C.I.T.* that liability to tax arises on sales of investments, where the sales are in course of business, although the taxpayer may not be carrying on a separate and severable business of buying and selling invest-

ments with a view to profit. The realisation or conversion of securities by banks, loan and finance companies and insurance companies is generally held to yield trading profit, for varying investments and turning them to account are among the appointed means of such companies' gains. The sale of some of its securities by a bank, in order to meet withdrawals by depositors, or the varying of investments by a company which carries on the business of financiers and promoters, is a normal step in carrying on the company's business and the profits made on such a sale are on revenue account. But the realisation of a banking or insurance company's investments would result in an accretion of capital if the particular transaction is found to be purely on capital account and not in course of business."

Mr. Peddie also referred to *Case A35*[5] to stress the necessity to determine the reasons for the investment and reasons for the sale. In that case a question arose whether the shares in A. Ltd. an investment company, could be regarded by the bank as being part of its liquid assets available for the meeting of its commitments to depositors. The rights issue were sold because the bank thought sufficient shares had been acquired to secure collateral advantages.

The bank's objection to the assessment was allowed mainly because the Board found that "the purchases of the shares for the obtaining of collateral advantages were made to preserve and increase the goodwill structure of the bank and were investments of capital account." It was also found that the bank was not engaged in share trading and the purchases of the shares and sale of the rights were not transactions forming a part of its ordinary banking business. In arriving at the decision the Chairman of the Board of Review posed this question: "Was it a transaction of capital account for the purpose of adding to the profit-making structure of the National Bank — or was it a transaction forming part of the profit-earning activities within the structure?" The Chairman proceeded to make a finding of fact that it was the former. The Board relied for support on the decision of Kitto J. in the *National Bank of Australasia Ltd.* v. *Federal Commissioner of Taxation*.[6]

In *National Bank of Australasia Ltd.* v. *Federal Commissioner of Taxation, supra*, Kitto, J. held that "the purchase of the shares bore no resemblance to an investment of banking funds, made to earn income pending a need for their deployment in the making of advances and the like; it bore no resemblance to an investment by way of erecting a second or third line of defence against a time of stringency or emergency. It was an acquisition, not of the kind that might be repeated in the course of the profit-making process but made once and for all for the sake of enhancing, even if only for the time being, the profit-earning potential of the enterprise."

Kitto J. also held that the acquisition of those shares did not follow any pattern of investment that the National Bank had followed.

These cases do provide excellent illustrations of matters which should normally be taken into consideration. These matters are relevant but they are by no means exhaustive and, doubtless to say, different considerations may arise depending largely upon the peculiar facts and surrounding circumstances of that particular case.

In the instant case the Special Commissioners took into account certain factors which in their view were relevant in considering whether, on the facts before them, the shares purchased by the appellants were capital investment or stock-in-trade.

Primarily the court has to determine whether there were sufficient materials before the Commissioners to support their finding. In stating the case to this court, the Special Commissioners might not have stated fully the reasons for their finding, nonetheless, it cannot be said that they were disentitled to reach that finding if their conclusion was the one to which all the circumstances set out in the cases would inevitably indicate. It is the duty of the court to consider every relevant fact, giving it its due weight, and then to reach a conclusion upon the whole matter. Sir Wilfred Greene M.R., in *Commissioners of Inland Revenue* v. *British Salmson Aero Engines, Ltd.*[7] said —

"There have been many cases, which fall on the borderline: indeed, in many cases it is almost true to say that the spin of the coin would decide the matter almost as satisfactorily as an attempt to find reasons; . . . ."

It has to be borne in mind that in arriving at a finding the Special Commissioners had in all probability weighed all the evidence before them, they had undoubtedly rejected some of the appellants' contentions. The fact that they had not said so in so many words need not, I think, be construed that there was no basis for their finding.

Mr. Peddie strenuously argued that it was necessary to determine the intention at the time of the purchase. He cited these cases — *Harvey* v. *Caulcott;*[8] *Mitchell Bros.* v. *Tomlinson (H. M. Inspector of Taxes)*[9] and *Cooksey and Bibbey* v. *Rednall (H. M. Inspector of Taxes*[10]).

I quite agree that intention at the time of purchase is a relevant factor for consideration but whether the Commissioners' failure to make a specific finding would necessarily mean that they failed to appreciate its importance such that their decision ought not to be entertained is a matter for this court to determine in the light of the facts found and the inferences that may be drawn from these facts.

It seems to me the Special Commissioners took into account the circumstances surrounding the buying and selling of the shares by the appellants from various companies commencing from October 1964 and extending over a period of time before they made their finding that the business was a concern or adventure in the nature of trade. If the court is satisfied that there was reasonable evidence to support the Commissioners' decision, then, in that event, I must not disturb their decision even though I personally may not have arrived at the same decision. Cross J. made a pertinent remark in *Lucy and Sunderland* v. *Hunt (H.M. Inspector of Taxes*[11]) when he said —

"When a judge thinks — as I certainly do — that he himself would not have arrived at the conclusion that the commissioners have arrived at, there is a temptation for him also to think that the conclusion at which the commissioners have arrived must be an unreasonable one. I must guard myself against that."

Mr. Peddie went on to cite the case of *The Dunn Trust, Ltd. (in voluntary liquidation)* v. *Williams (H.M. Inspector of Taxes*[12]). This is a case of the purchase of shares by a moneylending company from

its managing director. The shares were later sold at a profit after the company had commenced dealing in shares. The question was whether the profit was assessable. Before the General Commissioners the company contended that the sales of shares were realizations of investments and not trading transactions, and that, accordingly the surpluses were capital gains and not assessable to tax.

The *Dunn Trust* case, *supra*, seems to differ from the present case. In that case the company was incorporated in 1927 and trading as moneylender and the only purchase it made of shares was from the managing director in 1940. Although the company later extended its business to include dealings in shares it was not until 1943 that it did so.

Vaisey J. who heard the case noted the General Commissioners' finding to the effect that those purchases were made with the object of finding an investment for a portion of the company's reserves and not with the intention of dealing in stocks and shares. Consequently His Lordship at page 484 said —

"First of all we have the definite finding that these shares were purchased in 1940, not with the intention of dealing in these stocks and shares, but with the object of finding a permanent investment — or at least, the word 'permanent' is not used, but an investment of a portion of the company's reserves."

As will be seen from the following passage Vaisey J. said that the Commissioners' finding may nevertheless be consequent and relevant "if the right conclusion is the one to which all the circumstances set out in the case would seem to point."

"The statements at the end of sub-paragraph (14) about the circumstances in which the securities were disposed of seem to me to be utterly inconsequent and to have nothing at all to do with the matter if the conclusion which the commissioners have reached are the right conclusions, but on the other hand, they are very far from being inconsequent or irrelevant if the right conclusion is the one to which all the circumstances set out in the case would seem to point." (Page 485).

Mr. Peddie further referred to another passage at page 484 which reads —

"... these stocks or shares had been purchased with that object seems to me to be a finding which, in order to justify the conclusions of the commissioners, must have been followed by a further finding that at some time, in some manner, by some operation or other, the object had been reversed and the intention fundamentally altered."

Reference was also made to the case of *Californian Copper Syndicate (Limited And Reduced)* v. *Harris (Surveyor of Taxes*[13]) where Clerk L.J. says —

"It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business."

In the instant case the Special Commissioners concluded that the circumstances in which the appellants bought and sold shares in U.E.P. had sufficiently indicated that the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade. They had regard not only to the circumstances in which the appellants dealt with those shares but also the manner in which they transacted the shares of various other companies commencing from October 1964 and during the period they were carrying on finance business.

The Commissioners seemed to have found that the appellants, in buying and selling not only soon before they commenced finance business but also during the years they carried out finance business, had indeed carried out trading activities connected with their principal business as a finance company. When they purchased the U.E.P. shares they seemed to have done so pursuant to their intention to carry on a business of dealing in shares as an adventure or concern in the nature of trade. In the case of *Taylor* v. *Good*[14] Megarry J., hearing an appeal from the General Commissioners, in the course of his judgment said —

"Finally, there was the offer of £54,500 for which contracts were exchanged on September 17, 1963; ... The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established by *Mitchell Bros.* v. *Tomlinson* (1957) 37 T.C. 224."

It was held in that case that "the property acquired with no thought of trading might afterwards become the subject of trade, and although the taxpayer had no intention of trading when he purchased the house, there was sufficient evidence to support the commissioners' finding that the taxpayer had carried on an adventure or concern in the nature of trade; but since the commissioners' finding did not indicate at what stage the taxpayer had begun trading, the case would be remitted to them to determine when the trading had begun and what value the property had when it became the subject of trading."

Megarry J.'s decision was however reversed on appeal. Russell L.J. in *Taylor* v. *Good (C.A.*[15]) said —

"With all respect, this, it seems to me ,is to turn the situation upside down. If the commissioners thought the events including the purchase constituted trading, it by no means follows that they would have arrived at the same conclusion without taking the purchase as part thereof. If the matter was properly to be remitted to the commissioners at all, the question should have been whether there was an adventure in the nature of trade excluding the purchase, which would be for the commissioners to determine — a point they had never determined. The form of remission adopted by Megarry J. could not therefore in any event, in my view, be allowed to stand."

His Lordship went on to say —

"The judge considered that as a matter of law the facts found could support a finding of a relevant adventure, excluding the purchase as part of the adventure. He relied for this upon the decision in *Mitchell Bros.* v. *Tomlinson* (1957) 37 T.C. 224, in this court, and dicta in three other cases, namely, *Cooksey v. Rednall* (1949) 30 T.C. 514; *Lucy and Sunderland Ltd.* v. *Hunt* [1962] 1 W.L.R. 7 and *Leach* v. *Pogson* (1962) 40 T.C. 585, all mentioned in the report below [1973] 1 W.L.R. 1249, 1257. I do not think that that case and those dicta at all support the judge's view, bearing in mind the fact that we are to regard the purchase in this case as in no wise a step taken with the object of later sale and as no different from an ordinary acquisition of a residence, or an inheritance by the taxpayer: and further bearing in mind that the taxpayer was at no time engaged, or intending to engage, in the activity of buying any other properties with a view to their sale at a profit, his other acquisitions of other properties being for investment only."

Mr. Peddie also cited the case of *Rudledge* v. *The Commissioners of Inland Revenue*[16] where Lord President (Clyde) observed as follows —

"It has been said, not without justice, that mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the appellant entered into an adventure or speculation, the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question."

In the same case Lord Sands at page 497/8 said —

"From the beginning to the end the intention was simply to buy and re-sell. Your Lordship in the Chair has indicated that there may be cases of purchase and re-sale at a profit where the transaction cannot be said to be in the nature of trade. In particular, this may be the case where there is no definite intention of re-selling when the purchase is made."

Mr. Peddie further cited *E. Finance Co.* v. *Comptroller of Income Tax*[17] to show that, in that case, there was specific finding made. It was held that the appellant had not proved that it purchased the land as an investment with the sole or dominant intention of holding the land as an investment and that it sold the land because its intention was frustrated whereas in the present case they bought the shares as they were part and parcel of development. Mr. Peddie pointed out that, in the present case, the appellant company had no business and no deposit, unlike *E. Finance, supra,* where the appellant was prepared to look for any avenue of business to invest its monies to pay the interest to the depositors and make a profit itself. Furthermore, the Commissioners found as a fact that it had to utilise its funds to acquire income from sources other than hire-purchase financing and was therefore more actively engaged in these other sources than that of hire-purchase business.

As for the appellants' contention that the Commissioners had failed to consider its importance at the time of acquisition of the investment, Mr. Peddie submitted that to determine the intention, the purchase of the U.E.P. shares must be viewed in isolation as a single transaction, and if the Commissioners had done that, they might have concluded that the acquisition was pure investment. The question is whether the Commissioners ought to have considered the purchase of the U.E.P. shares as a separate transaction and in isolation? Did they err in law when they failed to do so?

Encik Mohamed Nizar in his lengthy submission said that the conduct of the appellant company is a material point to consider. The company's existence was revealed from the Memorandum of Articles. The dominant intention was to carry all or any of the business ordinarily carried out by financiers, that is, to utilise money and all its resources in order to increase it to the benefit of the company. One of the objects was to hold shares in other companies.

After hearing submissions by both Mr. Peddie and Encik Nizar I formed the view that the Commissioners had not erred in law when they approached the question in the manner they did. They were perfectly entitled, as far as I can see, to consider the whole of the evidence before them. If, on the facts as set out in the Case, no person acting judicially and properly instructed as to the relevant law, could have come to the determination under appeal, then the Commissioners may not be said to have come to the right conclusion. On the other hand, if the circumstances in which the shares were purchased and disposed of viewed as a whole the only reasonable conclusion the Commissioners could have reached was that the appellants were carrying on an adventure or concern in the nature of trade, then their conclusion would not seem to be utterly inconsequent. It might be pertinent at this point to refer to the observation made by Lord Reid in *Frasers (Glasgow) Bank, Ltd.* v. *Commissioners of Inland Revenue*[18] when he said that —

"The question whether particular operations were acts done in carrying on the taxpayer's trade is not one that can be answered by applying any definite rule or criterion. The answer must depend on a consideration and evaluation of all the relevant facts."

To my mind the question that calls for consideration here is fundamentally one of fact. The Special Commissioners had considered the question and had made their finding of fact. The function of this court is primarily to determine whether upon the facts found by the Commissioners, they were capable of supporting their conclusion, in other words, whether the true and reasonable conclusion that can be drawn from the primary facts in the case, was that the appellants were indeed trading in shares.

In my view, there was ample evidence to establish that at the time of the purchase of the U.E.P. shares, the appellant company was embarking upon a business activity in pursuit of one of its objects. It may well be true to say that at the time when the purchase was made, the appellant company had not commenced finance business but there was evidence to show that the application to commence such business was made very shortly after the purchase, sufficient to establish that the purchase was closely linked with the appellants' business objectives as disclosed from the Memorandum of Articles, which was, to embark upon a business ordinarily carried out by financiers utilising money and all its resources through loan or otherwise in order to increase it to the benefit of the company.

The facts concerning the appellant company's subsequent trading activities became highly relevant. Encik Mohamed Nizar, quite rightly referred to Exhibit R12 which, he said, exposed the trading activities of the appellant company. He submitted that the appellants did not hold the shares as an investment but had kept them with the intention of disposing them as soon as they were needed to pay running costs and to pay interest to its own depositors.

On the facts found by the Commissioners, there was evidence to support a finding that the purchase and sale of shares was not done once but on several occasions, firmly indicating that the buying and selling of the shares was an integral part of the appellant company's business with a view to making a profit for the company.

The Revenue does not challenge that a company is as capable as an individual of owning property without becoming a trader but maintains that the paramount consideration is "the nature of its operations, and not its capacity, which finally determines whether

it carries on a trade or not." [Per Lord Warrington in *Jones* v. *Leeming*[19]].

Encik Nizar also drew court's attention to the case of *E. Finance, supra,* which, it is submitted, supports the Revenue's contention. Reference was also made to *Punjab Co-op. Bank Ltd.* v. *C.I.T., supra,* and the case of *Scottish Investment Trust Ltd.* v. *Forbes.*[20] In *Scottish Investment Trust Ltd.* v. *Forbes, supra,* the company appealed against an assessment in respect of the profits of the company made in the realisation of its investments in bonds and stocks. The Lord President said —

"It is true that the doing of any of these things might be incidentally necessary in the conduct of the business of any company. It is also true that this memorandum states in the latter heads of the same heads of the same article several things which are less properly described as objects of a company than as incidental acts of administration. But from the structure of the memorandum it appears that the varying the investments and turning them to account are not contemplated merely as proceedings incidentally necessary, for they take their place among what are the essential features of the business. In my view such speculations are among the appointed means of this company's gains."

[See also *Westminster Bank Ltd.* v. *Osler*[21]].

Turning now to the facts found by the Commissioners, it is to be observed that in paragraph 15 the Commissioners concluded that in buying and selling the U.E.P. shares, the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade. Looking at their finding as set out in paragraph 16, it would seem to me the Commissioners had plainly rejected the appellants' contention that they sold the shares because they feared the impending legislation especially when the appellants continued to buy and sell shares.

The Commissioners' findings in paragraph 15 and and paragraph 16 necessarily involve rejection of the appellants' contention that these shares were bought primarily as an investment. This is manifest by their finding in paragraph 17 where, taking into account that the appellants had not made any application to the Central Bank to keep those shares, they said that it could not have been the intention of the appellants, in buying shares, to keep them as investment.

In paragraph 18 there was further reference to the appellants' conduct in buying and selling shares. The Commissioners found that the appellants' conduct in buying and selling shares were inconsistent with their claim that they were apprehensive of impending restrictive legislation in Malaysia. They described the appellants' conduct as wholly inconsistent in that while on the one hand they were selling shares because of the fear of the legislation, on the other hand, they were buying more shares despite that fear.

In paragraph 19 the Commissioners rejected the reasons advanced by Richard Kong for the purchase and sales of shares listed in paragraph 9(e) which, *inter alia,* include the purchase of the shares under consideration. They concluded by saying, "The appellants had powers to deal in shares which they repeatedly bought and sold over a number of years. This, in our view, indicated that the appellants were embarking upon profit-making commercial transactions and were not buying shares as investments. The fact that the appellants may have intended to form connections with the companies in which they bought the shares does not negative trading. [See *J. P. Harrison (Watford), Ltd.* v. *Griffiths (H.L.)*"[1]].

It is significant to note that in determining the question before them, the Commissioners considered the pattern of the appellants' dealing in shares over the years. In their view, such dealings point inevitably to the fact that the appellants were embarking upon profit-making commercial transactions. It therefore meant that the Commissioners had not subscribed to the appellants' contention that they were buying shares as investment. The Commissioners did not ignore the possibility that the appellants might have intended to form connections etc., nevertheless, they found that this fact did not negative trading. In those circumstances I do not think it can be said that the Commissioners' finding was perverse or inconsistent with the facts they had before them or with the inferences they could draw from those facts.

In paragraph 20 the Commissioners stated that the buying and selling of shares in various companies was connected with their principal business as a finance company. The Commissioners were fully aware that the appellants had not yet commenced various classes of finance business at the time when they acquired the U.E.P. shares [see paragraph 9(e)]. There was, however, evidence before them that the appellants had, from October 20, 1964, bought and sold shares in various companies, and that the transactions were concluded mainly in the course of their carrying out finance business. The permission to commence finance business was applied for approximately two weeks after the U.E.P. shares were acquired. Nonetheless, there was the testimony of Richard Kong who stated that the appellants bought shares because one of their lines of business would be the granting of loan and their participation in U.E.P. would generate a loan business to their finance company. On these facts, the Commissioners, I think, were perfectly justified in concluding that the buying and selling of shares in various companies was connected with their principal business as a finance company.

In *Taylor* v. *Good (C.A.), supra,* Russell L.J., in his speech referred to the case of *Mitchell Bros.* v. *Tomlinson (H.M. Inspector of Taxes), supra,* and at page 224 said —

"It does not seem to me that this decision contradicts in any way the basis of the earlier decisions. If you find a period in which there are purchases and sales, it is not difficult to find a trade or dealing in land whatever may have been the original motive or purpose of acquisition.... If of course you find a trade in the purchase and sale of land, it may not be difficult to find that properties originally owned (for example) by inheritance, or bought for investment only, had been brought into the stock-in-trade of that trade."

There is only one other thing which I would in passing mention. The appellants argued that the trust deed was written evidence of establishment of a partnership or joint venture to buy 1,240 acres of land. It was thus clear that the appellant company's intention was to make capital investment. Looking at the whole of the circumstances on the Case Stated, I do not think that this fact would in any way alter the

Commissioners' finding or render the Special Commissioners' finding inconsistent or inconsequent.

In the light of the facts before the Commissioners, it is my judgment that they were right in arriving at a decision that the appellants were carrying on a business of dealing in shares as an adventure or concern in the nature of trade. The profits of $450,000 and $750,000 realised by the appellants on the sale of 750,000 and 1,000,000 shares in the U.E.P. were therefore assessable to tax as the profits constituted income in respect of gains of profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967.

The second part of the appeal is against the decision made by the Commissioners allowing the losses through the Singapore branch to be deducted from their income derived from Malaysia.

The Special Commissioners made the following finding —

"With regard to the losses the appellants suffered through their Singapore branch for the year of assessment 1968, we were of the view that those losses should be deducted from the appellants' income. Section 3 of the Income Tax Act, 1967, provides for the imposition of income tax on a person ordinarily resident in Malaysia upon his income from whereever derived, subject to and in accordance with the Act. Therefore, in the ascertainment of the appellants' total income for the year of assessment 1968, all profits and losses from wherever derived and incurred should be brought into account."

The Commissioners held that the appellants were entitled under section 44(2) of the Income Tax Act, 1967, (I shall call "the Act") to have their losses through their branch in Singapore deducted from their income derived from Malaysia. For convenience I reproduce that part of section 3 and section 44(2) of the Act which are relevant for purposes of this case —

"3. Subject to and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment —

(a) in the case of a person ordinarily resident for the basis year for the year of assessment, upon his income wherever derived, and...."

"44.(2) Subject to subsections (3) and (5), there shall be deducted pursuant to this subsection from the aggregate income of the relevant person for the relevant year the amount of any adjusted loss from a source of his for the basis period for the relevant year or,...."

Section 3 equally applies to a "company" ["person" includes a company (section 2 of the Act)].

At the hearing before the Commissioners the Revenue contended that —

"The losses incurred by the appellants through their Singapore branch should be disallowed. Section 40 of the Income Tax Act, 1967, provides for adjusted loss. However, article IV (1)(b) of the Double Taxation Agreement, 1966, entered into between Malaysia and Singapore, speaks of profits. Unless there are profits there can be no adjusted loss under section 40 of the Income Tax Act 1967; therefore the appellants cannot have their Singapore losses for the year of assessment 1968 taken into account."

In arriving at the finding the Commissioners did not seem to consider whether the Double Taxation Relief (Republic of Singapore) Order 1966 (I shall call "the Agreement") made under section 45 of the Income Tax Ordinance, 1947 applies. Although the 1947 Ordinance was revoked by the Act on its coming into force on January 1, 1968, the Agreement nevertheless continued in force for the year of assessment 1968 [see Article XXI paragraph 2 of Double Taxation Relief (Singapore) Order 1968 (P.U. 518 of 1968) and (P.U. (A) 211 of 1973)]. However, by reason of subsection (3) of section 1 the provisions of the Act would seem to have effect in regard to the year of assessment 1968 and subsequent year of assessment. There was therefore a situation that for the year of assessment 1968, not only regard must be given to the provisions of the Act but also the Agreement if applicable.

In the first instance, it is reasonable to construe that, in the light of subsection (3) of section 1 of the Act, the provisions governing the charge of income tax must be read subject to the Act. The question is whether such provisions must also be read subject to the Agreement in a case where the Agreement is applicable.

The appellant company is a Malaysian enterprise with a branch in Singapore. By reason of Article II (j) (ii) of the Agreement, this branch would for purposes of the Agreement, constitute a permanent establishment. As such, Article IV(1) (a) of the Agreement would be relevant for the determination of the question under consideration.

It is the appellant company's contention that the income of any business is computed by determining the gross income of that business to arrive at the chargeable or statutory income and the method by which the profits are to be ascertained is to apply the provisions of the Act by calculating the gross income and then the adjusted income, then the statutory income, the aggregate income, the total income and the chargeable income. The appellant company has not, however, questioned the applicability of the Agreement to the question under consideration.

The Commissioners obviously did not take into consideration the provisions of the Agreement, in particular Article IV(1)(a) which I mentioned earlier and which reads —

"The profits of a Malaysia enterprise shall not be taxable in Singapore unless the enterprise carries on a business in Singapore through a permanent establishment situated in Singapore. If the enterprise carries on business as aforesaid, tax may be imposed in Singapore on the profits of the enterprise but only on so much of them as is attributable to that permanent establishment. No further tax shall be imposed in Malaysia in respect of profits of the permanent establishment which are remitted to Malaysia."

Proceeding upon the basis that Article IV(1)(a) of the Agreement applies, and indeed I do hold that it does, it would seem that in that event, the profits of the appellant company's establishment in Singapore would be taxed in Singapore, and inevitably in imposing tax in Singapore the chargeable income had to be computed in the manner provided by law and in so doing, the losses, if any, for the year of assessment, must have been taken into account. The profits which are remitted to Malaysia, after deduction of tax in Singapore, are no longer subject to any further tax in Malaysia. If, as contended by the appellant company, the losses in Singapore should be taken into account, it would necessarily mean that these losses

would have to be deducted twice. In my judgment, this would seem inconsistent with the provisions of the Act. I am therefore of the view that the Commissioners had erred in law in arriving at the decision that the losses of the Singapore branch attributable to the business carried on in Singapore should be deducted from their income derived in Malaysia in the ascertainment of the appellant company's total income for the year of assessment 1968.

For this reason, I allow the appeal by the Revenue and would in so doing, state that in my judgment the losses in the Singapore branch cannot be deducted from the appellant company's income derived in Malaysia in the ascertainment of the appellants' total income for the year of assessment 1968.

I order that costs of this appeal be borne by the appellant company.

Order accordingly.

Solicitors: *Skrine & Co.*

KARTHIYAYANI & ANOR. v. LEE LEONG SIN & ANOR.

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Raja Azlan Shah F.J.) November 23, 1974]

[Ipoh — Federal Court Civil Appeal No. 3 of 1973]

Road Traffic — Negligence — Res ipsa loquitur — Finding of trial court — Whether can be upset an appeal — Vicarious liability.

Damages — Fatal accident — Expectation of normal working life.

Evidence Act, 1950, s. 157 — Corroboration — Observations on.

In this case the facts were that the first respondent had borrowed a car from his brother, the second respondent, to see a cinema show with his friend, the deceased. There was an accident on the way back from the cinema and the friend was killed. The appellants, the administrators of the estate of the deceased, brought an action for damages against the respondents. At the trial the first respondent gave evidence and denied negligence. The learned trial judge accepted the evidence of the first respondent as he held that his evidence was corroborated by the report and the previous statement made by him at the Coroner's inquest. The learned trial judge also dismissed the action against the second respondent as he held that the appellants had not pleaded the cause of action against him. The appellants appealed.

Held: (1) the learned trial judge had misdirected himself on the question of corroboration as neither the previous statement of the first respondent nor his statement to the police (which was not a first information report) could be used to corroborate his evidence effectively;

(2) the learned trial judge had also wrongly made findings of fact as to the speed of the car and its going on the grass verge which was not supported by the evidence;

(3) as the first respondent had not adduced reasonable explanation of the accident, which on the doctrine of *res ipsa loquitur* was consistent with negligence on his part, judgment must be given against him;

(4) the second respondent was not responsible for the negligence of the first respondent as there was no evidence to show that at the material time the first respondent was the second respondent's servant or was acting on second respondent's behalf as his agent.

Cases referred to:-

(1) *Colvilles Ltd.* v. *Devine* [1969] 2 All E.R. 53, 57.
(2) *Powell* v. *Strathan Manner Nursing Home* [1935] A.C. 243, 245, 247.
(3) *Watt or Thomas* v. *Thomas* [1947] A.C. 484, 487, 488.
(4) *Ormrod* v. *Crosville Motor Services Ltd.* [1953] 2 All E.R. 753, 754.
(5) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 191, 194.
(6) *Rambarram* v. *Gurrucharran* [1970] 1 All E.R. 749.
(7) *Norton* v. *Canadian Pacific Steamships Ltd.* [1961] 2 All E.R. 785.
(8) *Vandyke* v. *Fender* [1970] 2 All E.R. 339, 342.
(9) *Morgans* v. *Launchbury* [1972] 2 All E.R. 606, 613, 614.
(10) *Hilton* v. *Thomas Burton (Rhodes) Ltd.* [1961] 1 All E.R. 74, 76.
(11) *Klein* v. *Caluori* [1971] 2 All E.R. 701, 702.

FEDERAL COURT.

N. T. Rajah for the appellants.

B. K. Tan for the respondents.

Raja Azlan Shah F.J.: This appeal arises out of a motor car accident in which respondent No. 1 was injured and the only passenger was killed. Respondent No. 1 was driving the motor car. He had borrowed it from his brother, respondent No. 2, in order to see a cinema show together with his friend, the deceased, at Seremban. The appellants who are the administrators of the estate of the deceased passenger brought an action for damages in respect of his death against the respondents.

The following facts are not in dispute. After the show they were returning to Tanjong Sepat, Selangor. It was about 11 p.m. on 20 November 1966. They took the Sepang/Tanjong Sepat straight stretch of open road, which was 14' 6" wide. There were no street lights; it was drizzling. Some distance before they reached Tanjong Sepat the car ended up diagonally against the cement culvert on the opposite side of the road with the substantial part of the vehicle on the road. The car was a total wreck. The deceased died on the spot. Respondent No. 1 was severely injured. He was unconscious and regained consciousness at Klang Hospital. He lodged a police report 4 days later.

The appellants pleaded *res ipsa loquitur*. The respondents denied negligence. They averred that the accident was caused or contributed to by the negligence of the driver of an oncoming lorry which encroached into their path with the headlights blinding the driver (respondent 1) and therefore the accident could not have been avoided by the exercise of reasonable care on their part.

In the light of the pleadings it fell upon the respondents to give a reasonable explanation of the accident and show this explanation was consistent with no lack of care on their part. See *Colvilles Ltd.* v. *Devine*.[1] They only called the driver, respondent 1, and the owner of the car, respondent 2. The investigating officer who went to the scene the same night and drew the sketch plan was not called as witness.

The case for the respondents was to the effect that as the two vehicles were about to pass each other, respondent 1's eyes were blinded by the headlights of the oncoming lorry which was encroaching on his